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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	

To: The Commission

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION IN RESPONSE TO APPLICATIONS FOR REVIEW

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits the following comments in response to the applications for review filed by Excel Telecommunications, Inc. ("Excel") and Telco Communications Group, Inc. ("Telco") of two orders by the Commission's Common Carrier Bureau ("Bureau").[1]

I. BACKGROUND

In the *Payphone Order* and *Reconsideration Order*, the Commission established "interim" flat-rate compensation to be paid on a per-phone basis to each pay telephone provider.[2] The Commission concluded, however, that pay telephones owned by the

[1] Excel and Telco seek review of two Bureau orders, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, DA 97-678 (rel. April 4, 1997) (*First Waiver Order*) and *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, DA 97-805 (rel. April 15, 1997) (*Second Waiver Order*). CompTel submits these comments in accordance with the pleading cycle established by the Commission. *See Public Notice*, DA 97-1398 (rel. July 2, 1997).

[2] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, FCC 96-388 (Sept. 20, 1996) (continued...)

Regional Bell Operating Companies ("RBOCs") and other local exchange carriers ("LECs") were not eligible to receive this compensation so long as the LEC continued to receive payphone subsidies embedded in the pre-1996 Act regulatory structure. Thus, the Commission required the LECs to take a number of actions before their payphones could begin to receive the interim, flat-rate compensation established in the *Payphone Order*. Specifically, in a "compliance list" paragraph of its *Reconsideration Order*, the Commission required that in order to be eligible to receive compensation a LEC must be able to certify the following:

> 1) it has an effective cost accounting manual ("CAM") filing; 2) it has an effective interstate CCL tariff reflecting a reduction for deregulated payphone costs and reflecting additional multiline subscriber line charge ("SLC") revenue; 3) it has effective intrastate tariffs reflecting the removal of charges that recover the costs of payphones and any intrastate subsidies; 4) it has deregulated and reclassified or transferred the value of payphone customer premises equipment ("CPE") and related costs as required in the *[Payphone Order]*; 5) it has in effect intrastate tariffs for basic payphone services (for "dumb" and "smart" payphones); and 6) it has in effect intrastate and interstate tariffs for unbundled functionalities associated with those lines.[3]

Excel and Telco seek review of two Orders of the Common Carrier Bureau which granted 11th-hour waivers of the "compliance list" requirements and permitted the LECs to receive compensation beginning on April 15, 1997, even though they had not satisfied the *Payphone Order* and the *Reconsideration Order*'s conditions. In the *First Waiver Order*, the Bureau granted a waiver of the requirement that the LECs have effective federal tariffs for

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[2](...continued)
(*Payphone Order*); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, FCC 96-439 (Nov. 8, 1996) (*Reconsideration Order*).

[3] *Reconsideration Order*, ¶ 131.

unbundled features and functions associated with payphone lines.[4] The Bureau granted an extension for 45 days, until May 19, 1997, for the LECs to file these tariffs, but permitted them to begin receiving compensation as of April 15. In the *Second Waiver Order*, the Bureau extended this waiver to the requirement that the LECs have effective intrastate tariffs for basic payphone services.[5] As with the *First Waiver Order*, the Bureau authorized the LECs to receive compensation from IXCs beginning on April 15 even though it had not satisfied the compliance list.

II. THE BUREAU ERRONEOUSLY GRANTED WAIVERS PERMITTING THE BOCs TO RECEIVE COMPENSATION EVEN THOUGH THEY HAD NOT COMPLIED WITH THE COMMISSION'S ORDERS

A waiver of a Commission requirement may be granted only for "good cause shown."[6] Moreover, a waiver may be granted only if "special circumstances" warrant a deviation from the rule and the waiver does not eviscerate the general rule.[7] By erroneously excusing the BOCs' compliance with the Commission's standards, the Bureau's Orders conflict with the policy adopted in the *Payphone Order* and *Reconsideration Order*, which clearly required compliance with its safeguards *before* the BOCs could receive compensation.

CompTel agrees with Excel and Telco that "good cause" is lacking in this instance. The Commission issued its *Payphone Order* and *Reconsideration Order* in September and November, respectively, over 5 months before the April 15, 1997 deadline for compliance.

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[4] *First Waiver Order*, ¶¶ 20-21.

[5] *Second Waiver Order*, ¶¶ 18-19.

[6] 47 C.F.R. § 1.3.

[7] *Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

Indeed, the *Reconsideration Order* provided a "compliance list" describing exactly what the LECs had to do before receiving compensation pursuant to the interim flat-rate plan. Yet the ground for each waiver is an alleged ambiguity in the orders or a "misunderstanding" by the BOCs.[8] Nowhere do the BOCs explain why they did not seek clarification of these issues (or a waiver) before early April. Moreover, even accepting the BOCs' asserted good faith, their alleged "misunderstanding" cannot form the basis for an 11th hour abandonment of the Commission's considered decision to require compliance with its conditions *before* the LECs may move to the flat-rate compensation plan. A misunderstanding of the FCC's requirements -- particularly when the requirements were clearly articulated in list form over 5 months before the compliance date -- is not a "special circumstance" warranting a deviation from the Commission's rule.

Even if a waiver could be granted in this instance, the Bureau erred by providing a remedy that eviscerated the policy and substance of the Commission's rule. The Bureau's waiver order not only extended the LECs' deadline for compliance, but also reversed the Commission's decision that compliance had to precede participation in the compensation plan. This latter decision flatly contradicts the policies adopted in the *Payphone Order* and *Reconsideration Order*. In those Orders, the Commission concluded that the "compliance list" items must be implemented by the LECs, and repeatedly emphasized that a LEC may not receive compensation until it had completed each requirement.[9] Thus, even if an

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[8] *First Waiver Order*, ¶ 20 (citing the BOCs' "narrower reading of what payphone services need to be federally tariffed" as a basis for the waiver); *Second Waiver Order*, ¶ 14 (noting the BOCs' claim that none of them "understood the payphone orders to require existing, previously-tariffed intrastate payphone services . . . to meet the Commission's new services test").

[9] *See, e.g., Payphone Order*, ¶¶ 14, 127.

extension of the compensation deadline were permissible, the Bureau did not have authority to abandon the order of events adopted by the Commission. Therefore, if the Bureau could extend the deadline for compliance, it should not have permitted the LECs to receive compensation until the date on which they were in compliance with the requirements (*i.e.*, at the end of the 45 day extension granted by the Bureau). The decision to allow the receipt of compensation before this date must be overturned.

CONCLUSION

For the foregoing reasons, Excel and Telco's Applications for Review should be granted, and the Bureau's waiver orders should be vacated.

Respectfully submitted,

THE COMPETITIVE
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